JD(ATL)–46–05
Horn Lake, MS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MMC MATERIALS, INC.

and	**CASES 26–CA–21705**
	26–CA–21858
IUE-CWA, FURNITURE WORKERS	**26–CA–21993**
COUNCIL, LOCAL 282, AFL-CIO	**26–CA–22028**

William L. Hearne, Esq., for the General Counsel.
Jeffrey A. Walker and ***Todd P. Photopulos, Esqs.***, for Respondent.
Ida Leachman, for Charging Party Union.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on May 11 and 12, 2005. The charge in Case 26-CA-21705 was filed by IUE/CWA, Furniture Workers Council, 282 AFL-CIO, herein Union, on May 26, 2005. The Union filed the charge in 26-CA-21858 on September 21, 2004,[1] and the charge in 26-CA-21993 on February 17, 2005. The Union also filed the original charge in 26-CA-22028 on March 24, 2005 and an amended charge in 26-CA-22028 on April 22, 2005. Based upon the allegations contained in these charges, the Regional Director for Region 26 of the National Labor Relations Board, herein the Board, issued a Third Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing on April 25, 2005. The consolidated complaint alleges that on May 24, 2004, MMC Materials, Inc., herein Respondent, unilaterally implemented four changes in terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. The complaint also alleges that on or about October 11, 2004, Respondent unilaterally implemented a new vacation policy and on March 2 or 3, 2005, Respondent unilaterally implemented new job duties for plant operators. The complaint further alleges that as a result of the new job duties, dispatchers' hours were

[1] All dates are in 2004 unless otherwise indicated.

reduced and employee Jeff Hudspeth was suspended. Respondent filed a timely answer to the consolidated complaint denying the alleged unfair labor practices.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and by Counsels for Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Mississippi corporation, with an office and place of business in Horn Lake, Mississippi, has been engaged in the manufacture and delivery of ready-mix concrete. Annually, Respondent ships goods valued in excess of $50,000 from its Mississippi plants directly to points outside the State of Mississippi and purchases and receives at its Mississippi plants, materials and supplies valued in excess of $50,000 directly from points outside the State of Mississippi. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Bargaining Unit

It is undisputed that the following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and truck drivers, including mixer truck drivers, back-up plant operator, mechanics, shop leader, plant operators

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[2] On August 19, 2005 Counsel for the General Counsel filed a Motion to Correct the Hearing Transcript. The transcript section in dispute contains the following interchange during the redirect examination of Respondent witness Newell Kelly:

Q: Did you tell the truth today?
A: Yes.
Q: Did you tell Mr. Hearne the truth today?
A: Yes.
Mr. Hearne: I think obviously - -
Mr. Walker: Thank you, your Honor.
Mr. Hearne: - - we can obviously stipulate that he's telling the truth.

In his motion, Counsel for the General Counsel moves to correct the transcript to read: "we can obviously stipulate that he's saying that he's telling the truth." After given an opportunity to review the original hearing tape, Counsel for Respondent filed a response on August 26, 2005. Counsel for Respondent asserts that while he does not dispute the language cited in Counsel for General Counsel's motion, Respondent's review of the tape reveals a pause between the words, "that he's saying" and "that he's telling." Respondent thus contends that the most accurate transcription of the tape would read: "We can obviously stipulate that he's saying, that he's telling the truth." Counsel for the General Counsel filed no further response in this matter. Regardless of whether any pause in the statement necessitates a comma, there appears to be no dispute that Counsel for the General Counsel did not stipulate that Respondent's witness was "telling the truth" as erroneously reflected in the transcript. Accordingly, Counsel for the General Counsel's motion to correct the transcript is granted.

(batchmen), dispatchers, and loader operators employed by Respondent at its Hernando, Horn Lake, Olive Branch, Robinsonville, Coldwater, and Senatobia, Mississippi and Collierville, Tennessee ready-mix plants, excluding all office and plant clerical employees, professional employees, quality control-safety employee(s), watchmen, guards and supervisors as defined in the Act.

It is undisputed that on September 2, 1997 in Case 26-RC-7925, on October 10, 2000 in Case 26-RM-453, and on May 3, 2004 in Case 26-RD-1059, the Union was certified as the exclusive bargaining representative of the unit.

III. Alleged Unfair Labor Practices

A. Background

While maintaining an office and manufacturing plant in Horn Lake, Mississippi, Respondent manufactures and delivers ready-mix concrete throughout the North Mississippi area. In addition to the plant in Horn Lake, Respondent also operates plants in Robinsonville, Coldwater, and Olive Branch, Mississippi as well as Collierville, Tennessee. Scott Craft is the Area Manager for Respondent's North Mississippi operations and he maintains an office at the Horn Lake facility. Barry Fleming functions as the Operations Manager and Steve Berry is designated as Dispatch Manager. The Central Dispatch office that serves all plants in the North Mississippi area is also located at the Horn Lake facility.

Ida Leachman, herein Leachman, has worked for the Union for approximately 25 years and is currently the president. After the Union was first certified as the collective bargaining representative for the bargaining unit described above, Respondent and the Union began their negotiations in 1997. While the parties have held approximately 83 bargaining sessions, no overall agreement has been reached.

B. Issues

General Counsel maintains that between May 24, 2004 and March 2 or 3, 2005, Respondent implemented six unlawful unilateral changes in terms and conditions of employment for unit employees. Specifically, General Counsel alleges that while four of the alleged unilateral changes were discussed in contract negotiations, Respondent implemented the changes before the parties reached agreement or impasse. Specifically General Counsel alleges:

(a) On or about May 24, 2004, Respondent implemented a rule prohibiting the use of personal cellular telephones by Unit employees during working hours and requiring Unit employees to turn off personal cellular telephones during working hours.

(b) On or about May 24, 2004, Respondent changed its mixer truck loading policy to allow dispatchers to make morning work assignments to drivers according to a rotating list of drivers rather than by seniority.

(c) On or about May 24, 2004, Respondent implemented a new "clock out" and an equalization of driver-hours policy that allows for less senior drivers to receive work assignments in place of more senior drivers rather than making work assignments based solely on seniority.

(d) On or about May 18, 2004, Respondent announced, and about September 24, 2004 implemented, a rule changing its reporting time policy for Unit employees to allow for staggered start times later than the previous standard start times and requiring Unit employees to call in each afternoon to find out their report time for the following work day.

General Counsel further submits that the remaining two alleged unilateral changes were made without any notice to the Union and without providing the Union with an opportunity to bargain over the changes. These alleged unilateral changes involve:

(a) On or about October 11, 2004, Respondent implemented a new vacation policy requiring employees with available vacation time to be charged with use of the vacation time if the employee takes an unexcused day off from their work schedule.

(b) On or about March 2 or 3, Respondent implemented new job duties and requirements for plant operators by requiring plant operators to perform dispatching duties in addition to their plant operator duties when dispatchers are not at work.

(1) On or about March 2 or 3, Respondent, by implementing the new job duties for plant operators as described above, reduced the work hours of dispatchers.

(2) On or about March 8, 2005, as a result of the implementation of new job duties for plant operators, Respondent suspended employee Jeff Hudspeth.

Respondent does not dispute that certain rules and policies were communicated to employees at the times alleged. Respondent maintains, however, that four of the alleged changes involved merely the reduction to writing of Respondent's pre-existing practices. Specifically, Respondent asserts that the cellular telephone, hours-equalization, mixer truck loading order, and staggered start time policies were all in practice prior to Respondent committing these policies to writing. Respondent further submits that there was extensive bargaining with the Union concerning these three policies. Respondent's counsel asserts: "To the extent it could even be argued that any change has occurred with regard to these issues, any and all such changes were made only after the Union was given reasonable notice of Respondent's proposed actions, affording the Union reasonable opportunity to provide counter arguments or proposals. Thus, Respondent satisfied its duty to bargain."

Maintaining that the Union first corresponded with Respondent regarding the issue of hours-equalization in November 2002, Respondent also asserts that the matter is time barred by Section 10(b) of the Act. Respondent further submits that the order in which trucks are loaded first thing in the morning is a trivial matter that does not rise to the level of a term or condition of employment and even if it were a change it would be *de minimis*.

Respondent asserts that there has been no unilateral change with regard to vacation policy. While Respondent's new manager for the North Mississippi area posted a memorandum mistakenly containing a prior policy that was no longer in practice, Respondent immediately reverted to the status quo practice upon learning of the mistake. With respect to the alleged change in the duties of the plant operators, Respondent submits that while the majority of the processing of tickets and customer orders is handled by the Central Dispatch employees, plant operators have continued to process and send tickets in the absence of Central Dispatch employees.

While Respondent denies that there have been any unilateral changes, Respondent asserts that if any change has occurred, it is *de minimis* and fails to rise to the level of materiality necessary to trigger an obligation on the part of Respondent to bargain over it.

C. Overview of the Applicable Law

The duty to bargain in good faith, protected under Section 8(a)(5) of the Act, is defined by Section 8(d) as the duty "to meet … and confer in good faith with respect to wages, hours, and other terms and conditions of employment." "An employer's unilateral change in conditions of employment under negotiations is similarly a violation of 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736 (1962).

Respondent raises a number of defenses in asserting that it has not engaged in unilateral changes in violation of Section 8(a)(5) of the Act. Citing the Board's recent decision in *Crittenton Hospital*, 342 NLRB No. 67 (2004) and earlier cases,[3] Respondent asserts that in order to violate Section 8(a)(5), a unilateral change must be material, substantial, and significant. Respondent additionally maintains that merely reducing to writing and publishing an employer's past practice "does not represent a 'material, substantial, and significant change' constituting a breach of the bargaining obligation." *La Mousse, Inc*., 259 NLRB 37, 49-50 (1981). It is Respondent's position that the cellular telephone, hours-equalization, and staggered start time policies were all in practice prior to Respondent's committing these policies to writing. Respondent also takes the position that its prior practice for mixer truck loading order was simply memorialized in a May 2004 letter.

Respondent also argues it has met its duty to bargain even if the alleged changes rose to a level of materiality that triggers a duty to bargain under the Act. Principally, Respondent relies upon the decisions of the Fifth Circuit Court of Appeals in *Nabors Trailers, Inc. v. NLRB*, 910 F.2d 268 (5th Cir. 1990), cert. dismissed, 501 U.S. 1266 (1991) and *Pinkston-*

[3] *Fresno Bee*, 339 NLRB 1214 (2003); *Peerless Food Products*, 236 NLRB 1351 (1978).

Hollar Construction Services, Inc., 954 F.2d 306 (5th Cir. 1992). In these cases, the Court held that an employer does not violate Section 8(a)(5) of the Act when it implements unilateral changes, even in the absence of impasse, as long as the employer notifies the union that it intends to institute the change and gives the union an opportunity to respond to that notice.

The Board has found, however, that when parties "are engaged in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole." *Visiting Nurses Services of Western Massachusetts, Inc*., 325 NLRB 1125, 1131 (1998), enfd. 177 F.3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000). In its decision in *Visiting Nurses Services of Western Massachusetts, Inc*., the respondent employer also relied upon the "notice and opportunity to bargain" standard of the Fifth Circuit's *Pinkston-Hollar* decision. The Board noted that it had not adopted that standard in *Pinkston-Hollar* and it additionally declined to do so.

The Board recognizes only two limited exceptions to its rule articulated in *Visiting Nurses Services of Western Massachusetts*: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action. See *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom.

Respondent does not contend that either of these exceptions is applicable in this case. While Respondent might argue that the Union engaged in protracted, prolonged, and tedious bargaining over the seven year period prior to the first alleged unilateral change, there is no evidence that the Union engaged in avoidance or delay. Accordingly, I find the Board's standard in *Bottom Line Enterprises, ibid*, to be controlling.

D. The Alleged Unilateral Change in the Use of Personal Cellular Telephones

1. Parties' Arguments and Relevant Evidence

In alleging a unilateral change for employees' use of their personal cellular telephones, General Counsel relies upon Respondent's May 18, 2004 posted notice. The notice that was posted for employees at the Unit facilities explained that "new policies" for cellular telephones, mixer truck loading, staggered start time, and clock out procedures would be effective on May 24, 2004.

Union Representative Leachman testified that Respondent first proposed a policy concerning employees' use of cellular telephones for working time in a July 9, 2002 bargaining session. The proposal that was submitted in the form of a memorandum included: "Employees are permitted to carry personal cellular telephones. However, except in

Emergencies, the use of personal cellular telephones during working time is prohibited. During working time, employees are instructed to have personal cellular telephones switched to the "off" position." The proposals also provided that violations of the policy would lead to disciplinary action up to, and including, discharge. Leachman explained that the Union had no objection to drivers refraining from using their cell phones while they were driving. The Union took the position that the restriction should apply to all employees when they were actively performing their duties. In explaining why the Union did not accept Respondent's proposal, Leachman testified: "it did not include all of the employees, and it did not allow any time for them to use their cell phone, personal cell phone." The Union also objected because the proposal did not define "working time."

The cellular telephone policy was next discussed at a December 18, 2002 bargaining session. Respondent resubmitted its proposal with the additional language: "For purposes of this policy, 'working time' means any time that an employee is performing his duties, including operating a mixer truck, loading and unloading, and any other time when use of a cellular phone may interfere with the employee's ability to safely and efficiently perform his duties." Despite the modification, Leachman testified that she still rejected the proposal because it only included the mixer truck, loaders, and unloaders. In brief, Counsels for Respondent assert that while the definition of "working time" included examples of work performed by the mixer truck driver, loaders, and unloaders, the policy was not limited "solely" to these employee classifications.

In a letter dated January 7, 2003, counsel for Respondent stated that although Respondent had agreed to add the additional definition of "working time" in its proposal offered at the December 18, 2002 bargaining session, the Union apparently remained opposed to the proposed cellular telephone policy. Counsel explained that despite extensive discussions of the issue, the parties were at impasse on this matter. Accordingly, Respondent intended to publish the policy for employees on January 10, 2003. In response to Leachman's verbal request on January 10, counsel for Respondent agreed to delay the posting of the cellular telephone policy.

During the bargaining session on January 22, 2003, the Union submitted a proposal with the further modification:

> For purposes of this policy, "working time" means any time that an employee is actively performing duties. This includes Plant Operator, Dispatchers, Loaders, Operators, Drivers, Mechanics, and Batchman. When not actively performing their duties, they may use their personal cellular telephones.

Leachman testified, without contradiction, that the Union's proposal was rejected by Respondent. While the cellular telephone policy was next discussed during a March 2003 bargaining session, neither party contends that additional proposals were submitted. There were no further discussions of the cellular telephone policy or proposals until Respondent's letter to Leachman dated May 12, 2004. In the letter, Respondent stated:

> As you know, we have been negotiating about this policy for at least a year

> without brining the matter to a conclusion. The company continues to believe that the use of cellular telephones, especially by mixer truck drivers while operating mixer trucks, is a serious safety issue. Accordingly, if the union has any new or revised proposals or comments concerning the company's proposal concerning cellular telephones, please bring them to the May 13 meeting.

Leachman testified that during the May 13, 2003 bargaining session, Respondent's counsel submitted a document that "put into writing" the changes that the Union wanted. The document provided by Respondent included the following:

> Policy Concerning Use of Personal
> Cellular Telephones
>
> Except in emergencies, the use of personal cellular telephones during working time is prohibited. During working time, employees are instructed to have personal cellular telephones switched to the "off" position.
>
> For the purposes of this policy, "working time" means any time that an is performing his duties, including operating a mixer truck, loading and unloading, dispatching, and any other tine when use of a cellular telephone may interfere with the employee's ability to safely and efficiently perform his duties. Violation of this policy will lead to disciplinary action up to and including discharge.

Leachman testified that she rejected the proposal because: "It did not include all employees. It did not tell when the workers could use their phones. And it was not clear." During the course of the meeting, Respondent attempted to again modify the proposal by agreeing to delete a portion of the wording in the second paragraph. The words stricken from the proposal were "including operating a mixer truck, loading and unloading, dispatching, and any other time when the use of a cellular telephone may interfere with the employee's ability to safely and efficiently perform his duties." Despite the proposed deletions, Leachman rejected the proposal because she did not believe that the policy was completely clear as to the employees to whom it applied and it did not explain when employees were allowed to use their phones.

In brief, Respondent asserts that the Union's continued refusal to agree to the publication of the cellular telephone policy was based on frivolous grounds. Respondent points out that in the affidavit given to the Board, Leachman acknowledged that the Union had agreed in May 2003 to Respondent's proposal for a rule restricting the use of cellular telephones during working time to be a part of the collective bargaining agreement.[4]

[4] Respondent asserts in brief that Leachman stated in her affidavit that the Union had agreed to the language included in Respondent's contract proposal dated May 29, 2003. When she read her affidavit into the record, however, her prior testimony confirmed only that the Union had agreed to the language in Section I of Article 10 dealing with Safety. Section 1 provides "All employees shall observe and follow the safety rules and practices prescribed by the Company from time-to-time, using the protection equipment and devices required." Respondent's proposals introduced into evidence as Respondent Exhibit No. 13 reflect that while the Union agreed to Sections 1 and 2 of Article 10, there was no agreement on Section 3 relating to personal cellular

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Leachman testified, however, that while the Union had not opposed the existence of a cellular telephone policy, the Union opposed the wording of Respondent's proposal.

By letter dated May 18, 2004, counsel for the Respondent informed Leachman that the parties had effectively discussed the same cellular telephone policy for a year or more. Counsel states: "While there has been some wordsmithing by both parties, the essence of the policy has been discussed at considerable length for a considerable period of time, and there is simply nothing else to be discussed. As the company has explained on many occasions, the use of personal cellular telephones is considered by the company to be a significant and serious safely issue, which simply must be resolved. Accordingly, it is the company's intention to implement and require compliance with the policy effective May 24, 2004." By letter dated May 25, 2004 Leachman informed counsel for Respondent that the Union objected to the implementation of the policies discussed in the May 13, 2004 meeting.

The May 18, 2004 notice to employees explained that effective Monday, May 24, 2004 "use of personal cellular telephones during working hours is prohibited, except in emergencies. All personal cellular telephones should be off during working hours." The notice also provided that violations of this policy would lead to disciplinary action up to, and including, discharge.

Respondent asserts that it had exhausted negotiations with regard to this issue and had afforded the Union reasonable opportunity to propose counter arguments or proposals. Respondent contends that when the Union had no such counter arguments or proposals, Respondent had satisfied its duty to bargain and was legally justified in moving forward with the publication of this policy.

Newell Kelly has worked for Respondent for approximately nine years and has worked as both a mixer truck driver and a plant operator. Kelly testified that prior to May 24, 2004 there was an unwritten policy that employees could not use their cellular telephones while operating a mixer truck. Mixer truck driver Jimmy Bell testified that while he was unaware of any specific policy regarding cellular telephone use prior to May 2004, he did not use his cellular telephone while driving because it was unsafe. Kelly also testified that he could use his telephone when he was sitting in the break room and not in the truck.

2. Summary and Conclusions

Respondent argues that its memo of May 24, 2004 was "merely a publication of its past practice and a reduction to writing of an undisputed safety concern" and thus there was no unilateral change. Citing *Fresno Bee*,[5] 339 NLRB 1214 (2003), Respondent further asserts that even if a change had occurred, there was no proof establishing that the cellular telephone policy had anything more than a *de minimis* impact on employees.

telephones.

[5] An employer's administrative change in a payroll period was not found to affect employees or to have anything more than a *de minimis* effect.

Counsel for the General Counsel points out that while the Union acknowledged that it would not oppose a policy prohibiting the use of cellular telephones by employees while performing work duties, Respondent's bargaining proposals were actually far broader in scope and application. Additionally, Counsel for the General Counsel argues that while Respondent's earlier proposals use the term "working time," the implemented policy prohibited the use of the cellular telephones during "working hours." Although a definition of "working time" was included in Respondent's proposals, the implemented policy included no definition or guideline for determining "working hours." The policy did, however, confirm that employees are subject to discipline for a violation of the policy.

Though Respondent argues that the cellular telephone policy is a *de minimis* issue, there is no dispute that employees are subject to discipline for violation of the policy. Despite the fact that Respondent asserts that the policy is merely a written codification of an existing policy, there is no record evidence that any employees were previously disciplined for the alleged prior policy. The Board has held that an employer's creating new grounds for discipline represents "material, substantial, and significant" unilateral changes from the status quo of employment conditions. *Bath Iron Works*, 302 NLRB 898, 902 (1991). Thus, I find the policy to be a mandatory subject of bargaining.

In brief, Respondent describes in detail the tortuous bargaining history with respect to the cellular telephone proposal. There is no dispute that bargaining with respect to this issue covered a span of almost two years. For almost one year of that period, there were no reported proposals or discussions concerning this issue. I also note that it was Respondent who primarily submitted written proposals on this issue. With limited exception, the Union primarily responded by verbally rejecting Respondent's written proposals. An argument might be made that Respondent bore the brunt of the bargaining initiative with respect to this matter. While Respondent contends that it satisfied its duty to bargain, the actual publication of the cellular policy, however, undermines this assertion. Despite two years of bargaining about a policy restricting the use of personal cellular telephones during "working time," Respondent's implemented policy prohibits use of personal cellular telephones during "working hours" with no guidelines or definition by which employees can determine if they are in compliance or violation of the policy.[6] Respondent submits that under the Court's ruling in *Nabors Trailers v. NLRB*, 910 F.2d 268 (5th Cir. 1990), cert. dismissed, 501 U.S. 1256 (1991), negotiations do not have to exhaust themselves to the point of impasse. I note however, that the Court in *Nabors* nevertheless found that an employer must at least inform the union of the proposed action under circumstances which afford a reasonable opportunity for counter arguments or proposals. Inasmuch as the policy that was implemented on May 24 was different from its bargaining proposals, Respondent did not provide sufficient notice or an opportunity to evaluate and make counter proposals before the implementation of the policy.[7] Accordingly, I find that by implementing the cellular telephone policy on May 24, 2004, Respondent violated Section 8(a)(5) of the Act.

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[6] While the issue involved in this case is the use if personal cellular telephones, the Board has long noted a distinction between "working time" and "working hours" when an employer sets restrictions for employees' activities during the course of their workday. *Essex International Inc*., 211 NLRB 749 (1974).

[7] *Gannett Co., Inc*., 333 NLRB 355, 357 (2001).

E. The Alleged Change in Mixer Truck Loading Policy

1. Background Facts and Relevant Evidence

On July 9, 2002 Respondent provided a memorandum to the Union concerning the mixer truck loading order. The memorandum included in pertinent part, the following:

> Under ordinary operating conditions, the first loads of the day should be assigned at each plant according to the posted seniority list. That is, the first load of the day rotates on a daily basis from the top to the bottom of the seniority list. After all drivers are loaded, the loading order changes, essentially to the order of return to the plant. I believe that all plants have generally followed this practice.

Citing seniority concerns, the Union rejected the proposal. Leachman recalled that there were additional discussions concerning this issue in the December 18, 2002, bargaining session as well as in the bargaining session on May 13, 2004. While Leachman does not indicate that there was any agreement by the parties during the May 13, 2004 session, she acknowledged that the Union's position was that senior drivers would be loaded first. She also acknowledged that the parties discussed the procedure whereby the most senior driver would load first in the morning. Thereafter, loading would rotate downward through the seniority list.

Complaint paragraph 12 alleges that on or about May 24, 2004, Respondent changed its mixer truck loading policy to allow dispatchers to make morning work assignments to drivers according to a rotating list of drivers rather than by seniority. Respondent asserts, however, that during the May 13, 2004, bargaining session, Respondent and the Union reached agreement regarding the mixer truck loading order practice. In a May 18, 2004 letter to Leachman, counsel for Respondent stated:

> As to mixer truck loading order, the company is pleased that the discussions on May 13 resulted in mutual conclusion that the mixer truck loading order practice is well understood. As we have discussed on prior occasions, management has been concerned that variations in the practice have occurred from time to time at some plants. This letter confirms that the practice is for initial loading of the day to be done by seniority. After the first load of the day, loading is not done by seniority but by order availability and return to the plant. Accordingly, it is understood that, after the initial load of the day, a more senior mixer truck driver has no basis to request that a less senior driver be "bumped" and the more senior driver given a load simply because the driver is more senior.

The Union presented no evidence to show that it made any written response to dispute Respondent's May 18, 2004 assertions of an agreement on this issue. On cross-examination, Leachman acknowledged that she filed the charge because the Union was concerned that the

dispatchers were not following the seniority-based roster at each plant and were making assignments based upon favoritism. Leachman could not, however, identify the name of any driver who was loaded out of order according to his seniority list because of dispatcher favoritism. The Union presented no other witnesses to confirm that dispatchers were assigning by favoritism and failing to use the seniority-based roster.

Additionally, Union witness Jimmy Bell confirmed that prior to the May 2004 memorandum, the most senior drivers were offered the first load each day and a "rotating list" was used thereafter. Bell and employee Richard Salter testified that since the May 2004 memorandum, the loading order for each day is prepared by Central Dispatch with the most senior driver given the first load each day. The list follows a "rotation" based upon seniority. Bell testified that prior to May 2004; the most senior driver had the option of declining the first load of the day. He asserted that since May 2004, the most senior driver did not have the option of declining the first load. Leachman admitted, however, that employees are allowed to swap with other employees in the loading order if they wished to do so. She was unaware of any employee who had been prohibited from swapping out.

2. Summary and Conclusions

During the course of the trial, the parties submitted Joint Exhibit 1 containing time cards and payroll records for unit employees for the period from January 4, 2004 through April 28, 2005. Both Respondent and Counsel for the General Counsel submitted summaries of selective information from these voluminous documents. The summaries provided by Counsel for the General Counsel contain the names of drivers, dispatchers, and plant operators and their respective start times for each date within the respective time period. Counsel for the General Counsel asserts that each driver is listed in the summary in order of seniority, as used by Respondent on its payroll records. Counsel does not, however, clarify how employee seniority is shown on the time cards and other payroll records containing employee hours worked. While payroll records in Joint Exhibit 1 utilize a consistent order for listing employees, there are no identifiable seniority dates designated on the payroll lists. Although these voluminous records were offered as a joint exhibit, there was no witness testimony to explain the documents or to confirm the significance of the order of employees with respect to seniority or any other factor.

Attached to Counsel for the General Counsel's post-hearing brief are additional graphs and summaries utilizing Joint Exhibit 1 and Counsel for General Counsel's summaries of Joint Exhibit 1. Counsel for the General Counsel asserts that the additional analysis shows that prior to June 1, 2004, there was not generally an equal distribution of the earlier start times among the drivers, with the earlier start time more often being worked by the most senior drivers at the facility. Counsel for the General Counsel asserts that after June 1, 2004, the earliest start time was spread among the total drivers. It is readily apparent that Counsel for the General Counsel spent a great deal of time and effort in the preparation of these additional graphs and supplemental summaries. While I have considered the summaries and analysis as presented, the total record evidence does not, however, support a finding of a unilateral change for the mixer truck loading order.

Prior to the May 2004 memorandum, seniority was utilized to assign the first load for each day and there is no dispute that since May 2004, seniority continues to determine the driver assignment for the first load each day. Leachman concedes that despite the assignment by Central Dispatch, drivers are given the option of swapping with each other if they wish to do so. Bell and Salter's testimony confirms that the first mixer truck loading order of the day is done on a rotating, seniority-based order.

Thus, the total record evidence reflects that while the first-load procedure may have been memorialized by Respondent in May 2004, there is no significant change from the past practice. The assignment by Central Dispatch has essentially resulted in a difference without distinction. Additionally, I find it significant that after seven years of bargaining, Respondent's written assertion of agreement on this issue was not challenged in writing by the Union. Admittedly, the basis for filing the charge was a concern that Central Dispatch would assign "who they want to come in" rather than the seniority roster. Accordingly, I do not find that Respondent has unilaterally changed its mixer truck loading policy to allow dispatchers to make morning work assignments to drivers according to a rotating list of drivers rather than by seniority as alleged.

F. The Alleged Unilateral Change in Reporting Time Policy

1. The Parties' Arguments and Relevant Evidence

In a letter dated March 9, 2004, Respondent informed the Union that it proposed to "establish a call-in procedure in order to facilitate, when business demands so require, staggering driver staring times." Respondent explained that the practice would add greater efficiency to the operations while at the same time minimizing confusion or misunderstandings among employees concerning their designated starting times. In follow-up to the initial letter, Respondent explained in a May 12, 2004 letter:

> As to staggering start times, the proposed process will not be significantly different from existing practices except that the general practice will be to assign employees reporting times based on the daily scheduled work load rather than a more-or-less fixed reporting time.

Respondent went on to explain that most reporting times would be keyed to load time rather than a usual fixed report time. Mixer operators would report 15 minutes prior to load time when projected daily temperatures are above 40 degrees. Mixer truck operators would report 30 minutes prior to load time when projected temperatures were below 40 degrees. Plant operators, loader operators, and mechanics would report 60 minutes prior to the first load or as needed for job-specific tasks. Dispatchers would report 60 minutes prior to the first load or, if earlier, one dispatcher would report at 6:00 a.m.

Although the issue of staggered starting times was discussed again in the May 13, 2004 bargaining session, no agreement was reached. In its May 18, 2004 letter to the Union, Respondent's counsel explained:

> As to staggering start times, the company regrets the union's unwillingness to work through this important operational issue that has been discussed for months. The union's failure to offer any counterproposals concerning this matter - - other than simply to shout 'It's bullshit' - - is disappointing for a number of reasons.

In its letter, Respondent went on to explain that there had been a long and consistent practice of staggering start times when customers needs so require. Respondent asserted that its desire to formalize a staggered start practice was really nothing new and announced that the staggered start times would be effective as of May 24, 2004. In an announcement to employees dated May 18, 2004, Respondent stated that effective May 24, 2004, report times would be assigned based on anticipated loading times. The policy was not implemented, however, until September 2004.

There is no evidence that the Union presented any written or verbal counter-proposals on this issue at any time between March 2004 and September 2004. Leachman testified that it was the Union's position in bargaining that the regular starting time remain 7:30 a.m., however, she acknowledged: "And, of course, whenever the Company needed someone at a different time, it was the Company's right to ask them to come in."

Jimmy Bell testified that prior to the May 18, 2004 memorandum; he had never been scheduled to report for work later than 7:30 a.m. He asserted that since the memorandum, the latest that he has been scheduled to report to work was 8:30 a.m. He estimated that this occurred more than once. He also acknowledged that on those occasions when he was asked to come into work after 7:30 a.m., his shift continued for as long as there was work.

Respondent asserts that even before the memorandum of May 18, 2004, starting times were erratic. In brief, Respondent points out that Counsel for General Counsel's summary shows that prior to September 2004, drivers frequently came to work after 7:30 a.m. Respondent also maintains that the summary demonstrates that during the six month period prior to September 2004, there were 32 instances when drivers reported to work after 7:30 a.m. In contrast to his testimony, the summary reflects that during the six months prior to September 2004, Jimmy Bell reported to work twice after 7:30 a.m.

In brief, Respondent also argues that while General Counsel focuses only on whether the alleged change requires employees to report later than 7:30 a.m., General Counsel has failed to address the fact that employees have historically reported to work earlier than 7:30 a.m. There is no dispute that when drivers are hired, they are given an Applicant Interview Guide that provides: "The normal starting time for drivers and loader operators is 7:30 a.m. unless directed otherwise. Plant operators are to report to work at 7:00 a.m. unless directed otherwise." Driver Bell acknowledged that prior to May, 2004; he had been scheduled to report to work as early as 2:00 a.m., 4:00 a.m., midnight, as well as at 10:30 a.m. and at various times. He agreed that he and others[8] have done so because that was the nature of the

[8] Plant Operator and former driver Newell Kelly testified that when he had been a driver, he had been called in for work at different times both before and after 7:30 a.m. Kelly has not worked as a driver for the past

Continued

construction business.

Respondent asserts that despite any formalized staggering of start times, there is no evidence that drivers have lost hours. Specifically, Respondent asserts that while Counsel for the General Counsel prepared a summary exhibit of all the time records for the period between January 4, 2004 through April 28, 2005, Counsel for the General Counsel included only the start times and omitted the ending times for drivers. Respondent's summary of Joint Exhibit 1 includes a comparison of the total hours worked by the mixer truck drivers for each month within the relevant time period. The summary reflects that Bell averaged 198.07 hours for the first five months of 2004. The summary further reflects that during the seven month period following September 2004, Bell averaged 198.25 hours.

2. Summary and Conclusions

Based upon the total record evidence, I do not find that Respondent has unilaterally changed its reporting time policy in violation of Section 8(a)(5). While it is well settled that an employer is obligated to maintain the status quo during the initial bargaining with a newly certified union, the Board has also noted that not every unilateral change constitutes a breach of the bargaining obligation. The change unilaterally imposed must be a material, substantial, and significant one. *Peerless Food Products, Inc*., 236 NLRB 161 (1978). Citing its earlier decision in *Southern California Edison Co*., 284 NLRB 1205, fn. 1 (1987), enfd. mem 852 F.2d 572 (9th Cir. 1988), the Board has also recently reiterated that a change is measured by the extent to which it departs from the existing terms and conditions affecting employment. Both testimony and documentary evidence reflect that prior to the May 2004 memorandum, drivers occasionally reported to work later than 7:30 a.m. Additionally, the evidence reflects that they were routinely required to report to work at various times much earlier than 7:30 a.m. Counsel for the General Counsel submits that without a standardized start time, drivers were required to call in each afternoon to find out their reporting time for the next work day. While this may pose an inconvenience for drivers, the Board has found that the mere fact that an employee is "disadvantaged" by a change is not alone sufficient to satisfy the test of whether a change must be bargained. The test remains whether the change is material, substantial, and significant. See *Berkshire Nursing Home*, 345 NLRB No. 14, slip op. at 2 (2005).

G. The Alleged Change in Equalization of Driver Hours

1. The Parties' Argument and Relevant Evidence

Leachman testified that during negotiations on December 18, 2002, Respondent submitted a memorandum concerning the distribution of driver hours. The memorandum provided:

> To help avoid some drivers working significantly more hours than other

four years. While Kelly testified that Respondent did not normally have a designated start time except for slow days and rainy days, I also note that Kelly has previously filed a decertification petition with the Board.

> drivers, the company has always attempted to distribute hours in a fair manner. To better ensure a fair distribution of hours, when there is not enough work at a plant to keep all drivers busy all day, the following procedure will be followed in selecting drivers to be sent home for the day.

The memorandum went on to explain that the drivers with the lowest number of cumulative hours worked for the week would be given the opportunity to continue working for the day. If two or more drivers had the same number of cumulative hours worked for the week, seniority would control the order of choice. If the driver with the lowest cumulative hours of the week chose to go home, the employee with the next lowest cumulative hours would be given the opportunity to work. The memorandum ended with an explanation of how cumulative hours would be determined. Leachman testified that she strongly opposed the proposal because "it would eliminate seniority for the drivers." Leachman recalled that this issue was again discussed in negotiations in late 2003 or early 2004 and possibly again on May 13, 2004.

In Respondent's letter to the Union dated May 18, 2004, Respondent also mentioned the issue of equalization of hours. Respondent asserted that its proposal to equalize hours once the more senior drivers reach 32 hours in a work week is reasonable and Respondent opined that the Union's position that "seniority it is" is unreasonable and contrary to the interests of a stable workforce. Respondent additionally explained that it was Respondent's position that mixer truck operators with at least 32 cumulative work week hours should be released before other drivers, regardless of seniority. Respondent informed the Union that having heard no other proposal from the Union on this issue, it would implement the clock-out procedures on May 24, 2004. The May 18, 2004 memorandum to employees provided that beginning on May 24, 2004 all employees will be instructed to clock out based on production needs. Employees would be released based on location, cumulative work week hours, and seniority. The policy provided in pertinent part:

> If more than one person is at the plant, then seniority will be used until the senior employees reach 32 hours, then they will be released, unless the next employee has equal hours. With equal hours, the senior employee will have the option.

Counsel for the General Counsel asserts that the policy implemented on May 24, 2004 varied from prior proposals with respect to the number of hours a driver could work in a week before the hourly cap could prevent further work assignments.

Driver Bell testified that prior to May 24, 2004; the most senior driver would have the option of taking a delivery if there was only one run and more than one driver available. He further explained that since the implementation of the May 24, 2004 policy, less senior drivers are given load assignments even thought more senior drivers are available. Bell estimated that he had lost as many as 15 to 20 hours because he had been sent home while a less senior driver has continued to work.

Respondent defends the allegation concerning equalization of hours on two grounds.

Respondent asserts not only that equalization of hours is a past practice, but also that the issue is time-barred. In asserting that the allegation is time-barred, Respondent relies upon Leachman's November 18, 2002 letter to Respondent. Leachman asserts in her letter:

> The union has been informed that the employer 'MMC' has unilaterally changed the policy of using 'seniority' when all drivers are needed. The senior drivers are not asked if they choose to leave or stay, but some junior drivers are allowed to leave every day.

In brief, Respondent maintains that Leachman's letter clearly demonstrates that the Union was "well aware that Respondent was not strictly following seniority in the assignment of work." When asked about the letter at trial, Leachman explained that her letter had nothing to do with equalization of hours. She recalled that she wrote the letter because senior drivers complained to her that they were being forced to stay at work when a more junior driver was allowed to leave for personal reasons. She explained that while the matter had been resolved with respect to the junior driver, the issue was unrelated to equalization of hours.

Respondent maintains that Leachman's explanation is completely inconsistent with the clear language of her November 18, 2002 letter. I find, however, that the language of Leachman's letter is quite consistent with her explanation. Even a cursory reading of the letter reflects that Leachman was protesting Respondent's actions when "all drivers are needed." It is fairly apparent from her letter that she was protesting the fact that Respondent had allowed junior drivers to leave while requiring senior drivers to remain "when all drivers were needed." The wording of the letter does not reflect that Respondent was utilizing a procedure for allowing junior drivers to receive more work when senior drivers had reached or exceeded 32 work hours in a week or that Leachman was aware that Respondent was utilizing such a practice. Accordingly, I do not find that this issue time-barred pursuant to Section 10(b) of the Act.

Respondent also relies upon the testimony of former driver Kelly in asserting that Respondent had a past practice of equalizing hours for the drivers. When asked by counsel for Respondent if he was aware of "efforts being made to try to equalize the number of hours that the mixer truck drivers work," he replied "Yes." When asked to explain, he gave an example of what might occur if a senior driver had already worked as many as 34 hours in a week. Kelly opined that management "might" allow a less senior driver to get an early start the next morning to give him the opportunity to get additional hours. In further explanation, he opined that if a job began at 4:00 a.m., Respondent "might" allow a junior driver to report at 3:00 a.m. and the more senior drivers would report at 7:30 a.m.

Respondent maintains that Kelly must be credited because Counsel for the General Counsel called no witnesses to contradict Kelly's testimony. His testimony, however, does not substantiate that prior to May 24, 2004 Respondent had a practice of sending home senior drivers and giving the remaining work of the day to the junior drivers. The equalization of hours policy implemented by Respondent on May 24, 2004 specifically deals with seniority and cumulative hours as related to clocking out and is, in fact, defined in the memorandum as a "clock out policy." In contrast to Kelly's testimony that did not relate to clocking out

procedures, Bell's testimony indicates that it was Respondent's past practice to allow more senior drivers to get runs when there were more drivers than runs available. As indicated above, I found that documentary evidence contradicted Bell's recall concerning Respondent's past practice for staggering hours. With respect to the issue of equalization of hours, however, I find Bell's testimony to be credible and uncontradicted. I also note that while Kelly testified concerning his opinion relating to Respondent's alleged past practice for giving junior drivers the opportunity to work more hours, it is undisputed that Kelly previously filed a decertification petition to remove the Union as the collective bargaining representative. Certainly an argument may be made that Kelly is not aligned with the Union's position and its efforts to represent the Unit employees. Therefore, I find Kelly's testimony to not only be non dispositive of the issue of equalization of hours as related to clocking out, but also less persuasive.

Accordingly, the total record evidence supports a finding that Respondent unilaterally implemented a new "clock out" and equalization of driver hours policy in violation of Section 8(a)(5) and (1) of the Act.

H. Whether Respondent Unilaterally Implemented New Job Duties for Plant Operators

1. Background

Plant operators have historically been included in the bargaining unit. One plant operator is located in each of Respondent's five plant facilities. The plant operators are primarily responsible for operating the loading machine located at each facility and ensuring that the mixer trucks are loaded properly for delivery to the customers. Plant operators are expected to prepare the plant for daily operation. Once the plant is operational, the operator schedules the trucks for loading. If there are no trucks to be loaded, an operator may clean or check product samples. The operators also do small maintenance and are responsible for shutting down the plant at the end of the day. The plant operators primarily work in an office identified as the "batch office." The batch office contains the manual board that operates the loading machine and the batch computer, from which the plant operator sends loading orders to the loading machine. There is also a dispatch, or tracking computer, that shows the deliveries to be made from each of the facilities and the status of the mixer trucks operating from each facility.

In a letter dated September 17, 2001. Respondent provided a written response to the Union's request for information concerning a number of subjects. In response to one item, Respondent explained the duties and responsibilities of the plant operators. Counsel for Respondent clarified that at the direction of the Area Manager; the plant operator will process a customer's order and direct the mixer truck operator to the appropriate job. The Union does not dispute that at this point in time, the plant operators were responsible for customer orders.

In a letter dated November 30, 2001, Respondent confirmed its contemplation of implementing Central Dispatch for all plants in the bargaining unit. Leachman acknowledged that the Union and Respondent engaged in extensive discussions about the implementation of Central Dispatch. In his December 7, 2001 letter to the Union, counsel for Respondent states:

"This letter is in response to your December 3, 2001, letter concerning a central dispatch. As we discussed during our last bargaining session, the Company does not anticipate any significant changes to the duties of bargaining-unit employees as a result of central dispatch." Leachman acknowledged that as a result of the December 7, 2001 letter, she understood that the duties of bargaining unit employees would not change significantly after the creation of Central Dispatch.

After negotiating with the Union, Respondent implemented Central Dispatch in 2002. The record reflects that during negotiations and prior to the implementation of Central Dispatch there was extensive discussion between the Union and the Respondent with respect to the job duties that would be performed by the dispatchers in Central Dispatch. After the Union voiced concerns that dispatchers might perform some of the duties performed by bargaining unit employees, Respondent proposed including the dispatchers in the bargaining unit. The Union agreed to the inclusion of the dispatchers.

Area Manager Scott Craft testified that a plant operator uses the dispatch computer to track deliveries that are scheduled to the plant throughout the day. When the ticket is sent to the plant, the operator verifies the customer, the delivery, and the product to be delivered. Craft explained that prior to the creation of Central Dispatch; plant operators processed their own customer tickets. Counsel for the General Counsel asserts that after the creation of Central Dispatch, the dispatchers were primarily responsible for taking and imputing customers' orders, making load assignments, and sending tickets reflecting this information to the plant operators at each facility. Leachman acknowledged that she did not know whether plant operators continued to take customer orders and process tickets after the implementation of Central Dispatch. Craft however, testified that the job description for plant operators did not change after the creation of Central Dispatch and that there were occasions when plant operators initiated orders. He explained that plant operators may initiate orders for an early morning "pour" or when a customer may need an additional load to finish their order at the end of the day.

2. The Alleged Change in Procedure

Relying upon the testimony of plant operator Jeff Hudspeth, Counsel for the General Counsel asserts that prior to March 8, 2005, Respondent's practice was to call in a dispatcher to make truck assignments and to send tickets to the plant operator if loads were to be sent out prior to 6:00 a.m. Hudspeth testified that he could not recall any occasion that he had reported to work for a pour scheduled prior to 6:00 a.m. and a dispatcher had not been called in as well.

Hudspeth testified that in early March 2005, Dispatch Manager Steve Berry contacted him by telephone and asked how much he knew about sending tickets. When Hudspeth told him that he was not familiar with the process, Berry explained that would he give him some assistance and show him how to do so. Hudspeth recalled that a few days later, he also spoke with Operations Manager Barry Fleming and Area Manager Craft about his initiating tickets.

On March 8, 2005 Hudspeth reported to work at 12:30 a.m. because of a large pour

that was scheduled for 2:00 a.m. He recalled that Jason Ford with Quality Control came in to work around 1:00 a.m. and informed him that he needed to begin sending tickets. Hudspeth described his interchange with Ford as:

> A: Well, Jason Ford come in, and he asked me was I ready. And I told him, 'Yeah, I'm ready, ready to roll.' And he said, 'Well start sending tickets.' And I said, 'Well now where is Central Dispatch at this morning?' He said, 'They're not coming in. It's going to be your job to do it.' And I said, 'Well, now I'm not in Central Dispatch. It's not my job to do it.' He said, 'Yes, it is. It's going to be your job to do it.' And I said, 'Well, you better call them in. Get them to do it because it's not my job to do it.'

Hudspeth acknowledged that when asked again, he responded: "No, I'm not going to do it." Admittedly, he also told Ford that he didn't care who Ford called because of his refusal. Following this interchange, Hudspeth received a telephone call from Joel Wohrl in sales. When Wohrl explained that Hudspeth needed to begin sending tickets, Hudspeth refused and asserted that it was not his job. After Hudspeth's conversation with Wohrl, Ford came back into the batch office and informed Hudspeth that he would take care of batch himself and send the tickets. After Ford told him to leave the office, Hudspeth went to the drivers' room and remained there for a period of time. Later Wohrl found Hudspeth and told him that Steve Berry would send tickets and for Hudspeth to return to the batch office to start loading trucks. Later that same day, Hudspeth received a three-day suspension for his insubordination in refusing to send tickets.

Counsel for the General Counsel maintains that beginning on March 2 or 3, 2005, plant operators were given the responsibility for making truck assignments, sending tickets, and overseeing the truck loading process for periods when no dispatch employees were called in to work. Counsel for the General Counsel further submits that because the discipline to Hudspeth resulted solely from an unlawful change in plant operator duties, the discipline constitutes a violation of the Act.

3. Relevant Documents and Testimony

Submitted with Counsel for the General Counsel's post-hearing brief is a summary of Joint Exhibit 1 that is identified as a Plant Operator and Dispatcher Start Time Summary.[9] Counsel for the General Counsel explains that the summary shows the actual start times for the plant operators and dispatchers employed by Respondent for the period from January 1, 2004 to April 29, 2005. Counsel argues that the summary shows that prior to March 8, 2004, a dispatcher reported to work before 6:00 a.m. on the same days when plant operators were required to report for work prior to 6:00 a.m. Counsel proposes that the dispatcher reported early "presumably to assist the plant operator in the delivery process by making truck assignments and sending tickets." Specifically, Counsel asserts that for the period of time from January 1, 2004 to March 2, 2005, plant operators clocked in early 140 days and for the

[9] The summary is identified and offered as General Counsel Exhibit 41.

same period, dispatchers clocked in early 138 days. Counsel for the General Counsel further argues that for the time period from March 3, 2005 until May 1, 2005, plant operators clocked in early 36 days and dispatchers clocked in early only three days. A review of the summary reflects however, that on many of the days when a plant operator clocked in earlier than the dispatcher, a matter of minutes may have been involved. As an example, the plant operator for the Olive Branch facility clocked in at 5:22 a.m. on April 1, 2005. A dispatcher, however, clocked in at 6:04 a.m. While Hudspeth is shown to have clocked in at 5:26 a.m. on April 12, 2005, a dispatcher is shown to have clocked in at 6:02 a.m. Although Hudspeth clocked in at 5:24 a.m. on April 26, 2005, a dispatcher clocked in at 6:04 a.m. Inasmuch as a part of the plant operator's duties involved readying the plant for operation, it is not surprising that an operator may report to work as much as 30 to 45 minutes prior to the time when tickets are actually initiated. I note that on the day when Hudspeth received his suspension, he reported to the plant at 12:30 a.m. and began readying the plant for operation. He testified that a part of this process involved turning on the compressor, checking the belts, updating the moisture levels on the computer, checking the gates and determining that the bins were filled with the materials that were to be used that day. His testimony reflects that it was after 1:00 a.m. when Ford asked him to send the first ticket. Hudspeth's own testimony reveals that a plant operator's initial time after reporting may be devoted to readying the plant before he has an opportunity to send any tickets. Thus, while plant operators may report to work 30 to 45 minutes in advance of a dispatcher does not substantiate that they are performing dispatcher functions during this time.

Using Counsel for the General Counsel's same summary, Respondent also points out that even prior to March 2005, Hudspeth occasionally worked for significant periods of time without a dispatcher being present. Respondent points out that while Hudspeth began working at 4:00 a.m. on May 26, 2004, neither dispatcher worked that day. Respondent also references October 16, 2004 when Hudspeth reported to work at 12:30 a.m. and the first dispatcher did not arrive until 6:00 a.m. The summary also shows that on February 8, 2005, Hudspeth arrived to work at 3:13 a.m. and the first dispatcher did not arrive until 6:51 a.m.

In asserting that Respondent implemented new job duties for plant operators, Counsel for the General relies upon the records discussed above as well as the testimony of Hudspeth who denies that he initiated tickets prior to March 8. The total record evidence, however, reflects that plant operators have continued to initiate tickets even after the creation of Central Dispatch. Jimmy bell, who was presented as a witness for General Counsel, confirmed that plant operators occasionally send tickets for the "tail load" or the last load of the day and after dispatchers have left for the day. Plant operator Richard Salter, who was called as a witness for General Counsel, admitted that he had occasionally sent tickets prior to the time of the alleged change in job duties.[10] Salter also admitted that prior to Spring 2005, he had sent tickets for "tail orders" after dispatchers had left for the day. He testified that his hours have not increased dramatically since March 2005. Plant Operator Kelly testified that while he continues to send tickets, he does not send as many as he did prior to the creation of Central Dispatch.

[10] Salter testified that he stated in an affidavit given to the Board: "Since I've been at the Collierville facility, I recall sending tickets on just a couple of occasions before March 2004."

4. The Actual Task Involved in Sending a Ticket

After the creation of Central Dispatch in 2002, Dispatch computers were installed in each plant operator's office. Area Manager Craft testified that plant operators use the dispatch screen to keep track of the deliveries throughout the day as well as to send their own tickets and load their trucks. Salter acknowledged that he has had both a dispatch computer and batch computer in his office since 2002. Salter explained that the entire process of sending a ticket involves the movement of the cursor on his computer screen between the icon for the truck to be loaded and the job to which it is being sent and then clicking to initiate. Hudspeth acknowledged that the process for sending a ticket involves clicking, dragging, and releasing the computer mouse. He also explained that the keyboard for both the batch computer and the dispatch computer are within hand's reach.

Plant Operator Mack Taylor testified that the process of sending a ticket requires a maximum of ten seconds. Richard Salter estimated the time required for clicking on the truck icon, dragging it across the screen to the designated job, and releasing the mouse to be two seconds. Area Manager Craft testified that during the month of April 2005, 195 "after-hours" tickets were sent from the Horn Lake facility. Respondent argues that based upon Salter's estimate on the time required to send tickets, only seven minutes would have been needed for the Horn Lake plant operators to send all the after-hour tickets for the entire month.

5. Summary and Conclusions Concerning the Alleged Unilateral Change

As illustrated by the discussion above, and based upon the entire record evidence, I do not find that Respondent unilaterally implemented new job duties and requirements for plant operators or reduced the work hours for dispatchers as alleged in Complaint paragraph 16. The record reflects that while plant operators were totally responsible for sending tickets prior to 2002, they have continued to occasionally send tickets when dispatchers are not available to do so. Thus, the evidence does not support a finding that Respondent has unilaterally changed the job duties for plant operators. I also note that the disputed task of sending the occasional ticket is accomplished in two to ten seconds. If an employer's unilateral change does not amount to a "material, substantial, and significant change," the employer does not violate the Act. For examples where the Board has not found the employer action to constitute a material, substantial, or significant change, see *Litton Systems*, 300 NLRB 324, 331-332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992) (installation of a new buzzer system for regulating break time led to a 20 percent reduction in the time some employees spent on their breaks); *J. W. Ferguson & Sons*, 299 NLRB 882, 892 (1990) (employer increased the lunch break by 5 minutes while decreasing the employees' afternoon break by 5 minutes); *Weather Tec Corp.*, 238 NLRB 1535 (1978) (employer unilaterally ended its practice of paying for the coffee supplies that the employees used to make the coffee for their morning and afternoon breaks). Even when an employer makes a change that would otherwise pertain to a mandatory subject of bargaining, the Board has not found a violation when there has been no significant detriment to unit employees. See *Alamo Cement Co.*, 277 NLRB 1031 (1985). In summary, I do not find that Respondent has unilaterally changed the job duties as alleged. Additionally, even if there was a change in job

duties, such change does not constitute a material, substantial, or significant change.

6. Summary and Conclusions Concerning Hudspeth's Discipline

Counsel for the General Counsel proposes that because the discipline to Hudspeth resulted solely from the alleged unlawful change in plant operator duties, the discipline would also constitute a violation of the Act. I do not find that the record supports this conclusion.

There is no dispute that Hudspeth refused to send the tickets as requested on March 8. There is neither a contention nor is there evidence that Hudspeth's discipline was based upon his engaging in union activity or even protected concerted activity. Admittedly, he refused to send the tickets because he took the position that doing so was not a part of his job duties. Certainly, the Board has held that discipline of an employee violates Section 8(a)(5) of the Act if the employer has unlawfully implemented work rules or policies that were a factor in the discipline. See *Great Western Produce*, Inc., 299 NLRB 1004, 1005 (1990). As discussed above, the record does not support a finding that Respondent unilaterally changed the job duties for plant operators. Both witnesses for Respondent and the General Counsel confirm that plant operators have continued to send tickets even after the creation of Central Dispatch in 2002. Thus, Hudspeth's refusal constituted insubordination that is otherwise not protected by the Act. Accordingly, I do not find that Respondent violated the Act by issuing the discipline to Hudspeth on March 8, 2005.

I. The Alleged Change in Vacation Policy

1. The Parties' Arguments and Relevant Evidence

Respondent asserts that no change has occurred with respect to Respondent's vacation policy. Area Manager Scott Craft testified that he mistakenly published what he believed to be Respondent's current practice, based on a 1995 memo. Respondent asserts that when Craft began working as the Area Manager for the North Mississippi Area in September, 2004, there were few written policies available to him. Craft testified that he relied heavily upon a specific clerical employee in the Horn Lake office who had corporate knowledge regarding Respondent's various unwritten policies. Because the employee was undergoing treatment for a significant medical condition, he was frequently absent for periods of time. During the clerical employee's absence, Craft found a memorandum concerning employee absences that had been issued by Respondent's Area Manager in 1995. Believing that this memorandum contained the current vacation pay practice for the North Mississippi area, Craft incorporated the policy into an October 11, 2004 memorandum to employees. Craft testified that he was not trying to create a new vacation policy, but he was simply publishing what he thought to be Respondent's current vacation policy.

The October 11 memorandum informed employees that if they took an unexcused day, they were required to take vacation for the absence. Respondent does not dispute that this requirement was a departure from the existing practice in October 2004. Employee Earl Black testified that the policy prior to October 11 did not require employees to use a vacation day when they requested a day off. Counsel for the General Counsel asserts that because this

requirement affected the employees' usage of vacation days available to them, this is a mandatory subject of bargaining between the Union and Respondent. It is also without dispute that this requirement was posted without notice to or bargaining with the Union.

Craft testified that a short period of time after he published the memorandum, a "few" employees were charged with vacation for their unexcused absences. The employees notified Craft that this was in error. Craft testified that when he discovered the mistake with charging employees for vacation, he corrected the problem and restored their vacation days. During negotiations on March 7, 2005, Respondent submitted a proposal for allowing, but not requiring, employees to use available vacation if the employee takes an unapproved or unpaid day off. There is no dispute that Respondent's bargaining representatives explained that the proposal was offered to clear up any existing misunderstandings concerning when employees would be charged with vacation days. Employee Johnny Bell testified that other than the discussion during the March 7 bargaining session, Respondent has not provided any announcement or written statement confirming that the vacation policy was any different than that outlined in the October 11, 2004 memorandum issued to employees. Craft admitted that he was unaware of any written notice to employees informing them of the correct vacation policy.

2. Summary and Conclusion

The record evidence reflects that the October 11, 2004 memorandum to employees contained a material and significant change in the vacation policy that affected employees' terms and conditions of employment. Despite the fact that Respondent may have mistakenly implemented the policy, the implementation was without notice to, or bargaining with, the Union. While Respondent asserts that it has individually corrected any application of the incorrect policy, there has been no published repudiation of the incorrect statement of policy. See *North Hills Office Services, Inc*., 344 NLRB No. 134, slip op. at fn 11 (2005); *Claremont Resort, Inc*., 344 NLRB No. 105, slip op. at 1 (2005); *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Accordingly, I find that Respondent has not adequately rescinded the unilateral change in vacation policy. Based upon the record as a whole, I find that Respondent has violated Section 8(a)(5) and (1) of the Act.

J. The Resolution of Other Trial Issues

1. The Sequence of the Parties' Motions and Responses

As referenced above, the parties submitted into evidence a joint exhibit containing the time cards and payroll records that reflects the days and times worked by Respondent's employees for the period from January 4, 2004 through April 28, 2005. Following the completion of the hearing on May 12, 2005, I left the record open for the parties to review the documents contained in Joint Exhibit 1 and to prepare summaries if they wished to do so. I also allowed an additional period of time for the parties to respond to each other's submitted summaries.

On May 27, 2005, Counsel for the General Counsel forwarded his "draft proposed

summaries" of the payroll records contained in Joint Exhibit 1. On June 9, 2005, Respondent filed Employer's Objection to NLRB Time Record Summary.[11] In its objection, Respondent objected to the proposed summary because it was in spreadsheet form. Respondent also asserted that there were significant errors in Counsel for the General Counsel's summary. In his response of June 10, 2005, Counsel for the General Counsel defended the summaries' form and analysis. He also acknowledged that upon review, errors had been noted and corrected. On June 13, 2005, Respondent filed its summary for Joint Exhibit 1. On June 17, 2005, Respondent submitted its amended objections to Counsel for the General Counsel's summaries for Joint Exhibit 1 and included a listing of 130 discrepancies between the entries on Counsel for the General Counsel's summary and Respondent's time records contained in Joint Exhibit 1.

In follow-up to my June 10, 2005 post-hearing conference call with the parties, Counsel for the General Counsel submitted a revised and final summary of Joint Exhibit 1 on June 21, 2005. Counsel for the General Counsel asserted that the revised summary contained all but six of the corrections requested by Respondent. Counsel for the General Counsel explained that despite review of the underlying documents, he was unable to confirm the remaining six corrections proposed by Respondent.

On June 30, 2005, I issued an order closing the record in this matter. The order specifically provided that the summaries and responses filed by the parties would be considered as statements of position and that the summaries would be associated with the parties' post-hearing briefs and arguments. On August 3, 2005, Counsel for the General Counsel filed a post-hearing brief in this matter. As a part of his brief, Counsel for the General Counsel requested that his summaries of Joint Exhibit 1 be admitted into evidence as General Counsel Exhibits 36 through 41.

In a conference call with the parties on August 16, 2005, the parties raised their concerns with respect to the disputed portion of the transcript that has been discussed above in footnote 2 of this decision. The parties also discussed their respective positions with respect to Counsel for the General Counsel's request to submit the summaries of Joint Exhibit 1 as General Counsel exhibits 36 through 41. The parties were given additional time for the submission of a supplemental post-hearing brief or memorandum to specifically address the issue of the transcript error and the issue of whether Counsel for the General's summaries could appropriately be admitted as post-hearing exhibits.

On August 19, 2005, Counsel for the General filed a document entitled Position of Counsel for Acting General Counsel Regarding Admission of Summaries as General Counsel Exhibits. Counsel for the General Counsel asserts that even if I did not intend to admit the summaries of Joint Exhibit 1 as evidence, I may now admit the summaries pursuant to Rule

[11] The undersigned and the parties make various references to Counsel for the General Counsel's "summary" and "summaries." The total summary by Counsel for the General Counsel contains six separate individual summaries for specific employee categories and locations. Whether the term "summary" or "summaries" is used, the reference pertains to the collection of six summaries that are identified in the record as General Counsel Exhibits 36 through 41.

1006 of the Federal Rules of Evidence. Counsel for the General Counsel cites several cases[12] for the proposition that Rule 1006 of the Federal Rules of Evidence has been held to allow for the admission of summary evidence where the underlying records are voluminous, examination of the records in a trial setting cannot be done conveniently, and the underlying records are introduced into evidence or, at a minimum, made available to the opposition party for examination.

Additionally, on August 19, 2005, Respondent filed a document entitled Respondent's Reply Brief and Objection to Counsel for General Counsel's Motion to Enter Summary Documents into Evidence. Respondent renewed its objections to the admission of General Counsel's summaries as evidence and referenced its amended objection to the summaries that was filed by Respondent on June 17, 2005. Respondent asserts: "As set forth in Respondent's Amended Objection to NLRB Time Record Summary, there are 130 significant discrepancies between the time listed on Counsel for General Counsel's Summary Exhibit and the actual records contained in Joint Exhibit 1. Moreover, time records for two employees, Elvin Moore and Earnest Newsom, were omitted." Respondent again raised its objection that while Counsel for the General Counsel reflected starting times for employees on the summaries, Counsel for the General Counsel omitted the clock out times for employees in the summary. The remainder of the document is designated as a reply brief addressing Counsel for the General Counsel's post-hearing brief with respect to a number of the alleged unfair labor practices.

On August 23, 2005, Counsel for the General Counsel filed a motion to strike Respondent's Reply Brief. Counsel for the General Counsel asserts that Section 104.42 of the Board's rules and Regulations makes no provision for response or reply briefs to the administrative law judge. Citing *Hi-Tech Cable Corporation*, 318 NLRB 280 (1995), Counsel for the General Counsel further submits that while an administrative law judge may permit the filing of a reply brief, the party requesting to file such a brief must seek leave of the administrative law judge prior to its filing.

On August 29, 2005, Respondent filed an opposition to Counsel for the General Counsel's motion to strike Respondent's reply brief. Respondent argues the Board's holding in *High-Tech Cable Corp*. does not require a party to seek leave of an administrative law judge prior to filing a reply brief. Respondent further argues that nothing in Section 102.42 of the Board's Rules and Regulations prohibits the submission of reply briefs. Respondent argues that it filed a reply brief to identify and correct misstatements of the record appearing in Counsel for the General Counsel's post-hearing brief and that by identifying these issues, Respondent promotes judicial economy. Explaining that it is doing so "out of an abundance of caution," Respondent also includes a motion for leave to file a reply brief.

[12] *U.S. v. Duncan*, 919 F.2d 981 (5th Cir. 1990), rehearing denied, cert. denied, 500 U.S. 926 (1991); *U.S. v. Smyth*, 556 F.2d 1179 (5th Cir. 1977), rehearing denied 557 F.2d 823, cert. denied, 434 U.S. 862 (1977).

2. Conclusion Concerning the Issue of General Counsel's Motion to Submit Summaries as Post-Hearing Exhibits

Rule 1006 of the Federal rules of Evidence provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

The summaries offered by Counsel for the General Counsel include dates, employee names, work facilities, and the individual employees' starting time for each day within the relevant time period. The underlying records have been admitted into evidence as Joint Exhibit 1. In Respondent's June 17, 2005 amended objection to General Counsel's summaries, Respondent asserts that there are 130 discrepancies between the entries on Counsel for the General Counsel's summaries and the actual time records contained in Joint Exhibit 1. When Counsel for the General Counsel filed his final copy of the proposed summaries on June 21, 2005, he clarified that he had made the corrections requested by Respondent with the exception of six entries that could be not verified.

When Respondent filed a subsequent objection to the admission of General Counsel's summaries on August 19, Respondent simply referenced its earlier objection and reasserted the alleged 130 discrepancies. Respondent did not address or contradict General Counsel's June 21, 2005 assertion that the corrections were made. Respondent also contended that General Counsel's summaries should be rejected because the summaries omitted employees Elvin Moore and Earnest Newsom. Despite this assertion, however, Counsel for the General Counsel's summary for Robinsonville driver start times includes Elvin Moore. Employee Newsom is listed on the summary of start times for the Olive Branch drivers. Thus, Respondent has not demonstrated that the summaries must be rejected because of significant discrepancies as alleged.

I have considered all the arguments posed by the parties with regard to this issue and I have determined that Counsel for the General Counsel's summaries may be admitted into evidence as requested. In reversing my earlier ruling, I am also cognizant of the fact that Respondent's Exhibit 16 is a summary of "After-Hours tickets by Plant Locations" for the period from March 2004 to April 2005. Both the summary and the underlying documents were received into evidence without objection. In submitting his summaries of Joint Exhibit 1, Counsel for the General Counsel argues that the admission of the summaries will assure their availability for review by the Board or any other court. I find merit to Counsel for the General Counsel's argument.[13] Accordingly, the following exhibits[14] are received into

[13] I also note that Respondent submitted a summary exhibit regarding Joint Exhibit 1. Although not numbered, the document is nine pages in length. A portion of the document summarizes monthly hours worked by specifically named employees and categorizes employees by years of service. The document also includes a summary of "yards poured by plant." While Joint Exhibit 1 contains documents reflecting start times, hours worked, wages, and locations of employment, seniority of employees is not readily apparent. While the production and yardage calculations may originate from Respondent's collective exhibit 30, the payroll records contained in Joint Exhibit 1 do not appear to correspond to the production totals as contained in Respondent's

Continued

evidence: (1) General Counsel Exhibit 36 that is identified as MMC Horn Lake Drivers (2) General Counsel Exhibit 37 that is identified as MMC Olive Branch Drivers (3) General Counsel Exhibit 38 that is identified as MMC Collierville Drivers (4) General Counsel Exhibit 39 that is identified as MMC Coldwater Drivers, (5) General Counsel Exhibit 40 that is identified as MMC Robinsonville Drivers, and (6) General Counsel Exhibit 41 that is identified as MMC Plant Operators and Dispatchers' Employee Start Times.

3. The Issue of Respondent's Reply Brief

As indicated above, the parties were given additional time to file their positions in a post-hearing brief or memorandum with respect to two issues only; the alleged transcript error and Counsel for the General Counsel's motion to submit his summaries of Joint Exhibit 1 as General Counsel Exhibits 36 through 41. While Respondent filed a response to General Counsel's motion to correct the transcript and an objection to Counsel for the General Counsel's motion to enter the summaries into evidence, Respondent also filed a reply brief addressing Counsel for the General Counsel's post-hearing brief and some of the substantive issues involved in this case.

Section 102.42 of the Board's Rules and Regulations neither provides for the filing of reply briefs nor prohibits the filing of such briefs. Inasmuch as I have carefully reviewed the entire record in this case, I am aware of any misstatements in the initial briefs and I am also aware of any statements or positions taken by the parties that are not supported by record evidence. Accordingly, finding no necessity for Respondent's Reply Brief, I grant Counsel for the General Counsel's motion to strike Respondent's Reply Brief and I deny Respondent's motion for leave to file a reply brief.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally implementing a rule concerning Unit employees' use of their personal cellular telephones, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By unilaterally implementing a new "clock out" and equalization of driver hours policy, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By unilaterally implementing a new vacation policy, Respondent has violated Section 8(a)(1) and (5) of the Act.

summary. Although Respondent has made no motion to submit this nine-page document into evidence as an exhibit, it would not appear appropriate for admission.

[14] The exhibits are attached to Counsel for the General Counsel's August 3, 2005 post-hearing brief.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other manner as alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unilaterally implemented a policy for its employees' use of their personal cellular telephones, must rescind the unilateral change and rescind any discipline issued to employees as a result of the unilaterally implemented policy.

The Respondent, having unilaterally implemented a new "clock out" and equalization of driver hours policy, must rescind this unilateral change and make whole any employees who may have lost work as result of this unilateral change.

The Respondent, having unilaterally implemented a new vacation policy, must rescind the policy and inform employees to the same extent that employees were notified of the initial unlawful unilateral change.

In his post-hearing brief, Counsel for the General Counsel reiterates the consolidated complaint's request for an order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co*., 136 NLRB 785 (1962). The record, however, does not reflect that the Respondent has failed or refused to recognize the Union or to meet and bargain with the Union in good faith following the most recent recertification. Accordingly, I do not find a *Mar-Jac* remedy warranted. *Visiting Nurse Services of Western Massachusetts, Inc*., 325 NLRB 1125, 1132 (1998); *Cortland Transit Inc*., 324 NLRB 372 (1997).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[15]

ORDER

The Respondent, MMC Materials, Inc., Horn Lake, Mississippi, its officers, agents, successors, and assigns, shall:

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Failing and refusing to bargain collective with the IUE/Furniture Workers Council, Local 282, AFL-CIO, as the exclusive bargaining representative of the unit employees by unilaterally implementing an employee personal cellular telephone policy; implementing a new "clock out" and equalization of driver-hours policy; and implementing a new vacation policy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the unilateral changes it has made in the terms and conditions of employment of unit employees by unilaterally implementing an employee personal cellular telephone policy; implementing a new "clock out" and equalization of driver-hours policy, and implementing a new vacation policy.

(b) Before implementing any changes in terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All production and maintenance employees and truck drivers, including mixer truck drivers, back-up plant operator, mechanics, shop leader, plant operators (batchmen), dispatchers and loader operators employed by Respondent at its Hernando, Horn Lake, Olive Branch, Robinsonville, Coldwater and Senatobia, Mississippi, and Collierville, Tennessee ready-mix plants, excluding all office and plant clerical employees, professional employees, quality control-safety employee(s), watchmen, guards and supervisors as defined in the Act.

(c) Within 14 days from the date of this Order, remove from its files any reference to discipline issued to employees pursuant to the unlawful unilateral changes found herein and as set out in the remedy section of this decision and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(d) Make whole any employees affected by the unlawful unilateral changes as set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay that may be due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its North Mississippi facilities copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

[16] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally change the terms and conditions of employment of employees represented by the IUE/Furniture Workers Council, Local 282, AFL-CIO in the following appropriate unit:

> All production and maintenance employees and truck drivers, including mixer truck drivers, back-up plant operator, mechanics, shop leader, plant operators (batchmen), dispatchers and loader operators employed by MMC Materials, Inc. at its Hernando, Horn Lake, Olive Branch, Robinsonville, Coldwater and Senatobia, Mississippi, and Collierville, Tennessee ready-mix plants, excluding all office and plant clerical employees, professional employees, quality control-safety employee(s), watchmen, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, at the Union's request, restore the terms and conditions of employment of the employees in the unit described above as they existed before our unlawful unilateral changes in the personal cellular telephone policy, equalization of driver-hours policy, and vacation policy.

WE WILL make whole, with interest, the unit employees for any losses they incurred by virtue of our unlawful unilateral changes in the personal cellular telephone policy, equalization of driver-hours policy, and vacation policy.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to any discipline administered to employees by virtue of our unlawful unilateral

changes, and **WE WILL**, within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

MMC MATERIALS, INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

The Brinkley Plaza Building, Suite 350, 80 Monroe Avenue
Memphis, Tennessee 38103-2481
(901) 544-0018, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544-0011.